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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1420

PEPSICO, INC.,

*Petitioner,*

—v.—

FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., individually and as Commissioners of the Federal Trade Commission,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON HANDLER
*Attorney for Petitioner*
*PepsiCo, Inc.*
425 Park Avenue
New York, N. Y. 10022

*Of Counsel:*

FRED A. FREUND
ELIZABETH HEAD
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

JAMES G. FRANGOS
MUDGE, ROSE, GUTHRIE, ALEXANDER & MITCHELL
20 Broad Street
New York, New York 10005

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner PepsiCo, Inc. ("PepsiCo") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on November 20, 1972.

### Citations to Opinions Below

The opinion of the Court of Appeals for the Second Circuit of November 20, 1972 is reported officially at 472 F.2d 179 and unofficially at 1972 Trade Cas. ¶74,260. The opinion of the District Court for the Southern District of New York of June 2, 1972, denying petitioner's motion

for a preliminary injunction and dismissing the complaint, is reported officially at 343 F. Supp. 396 and unofficially at 1972 Trade Cas. ¶74,035.

The opinions of the Court of Appeals and the District Court are respectively set forth in Appendices A and B to this petition.[1]

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on November 20, 1972, and is set forth in Appendix E hereto. Time for filing this petition for certiorari was extended to April 19, 1973 by order of Mr. Justice Marshall dated January 24, 1973 in accordance with 28 U.S.C. § 2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Question Presented

Does the Constitution require that bottlers whose substantial contract and property rights are placed in jeopardy by a Federal Trade Commission proceeding seeking to restructure the soft drink industry, and who will be bound *in absentia* by any cease-and-desist order issued therein, be joined as indispensable parties in the administrative action?

## Constitutional Provisions, Statutes and Rules Involved

The Constitutional provision involved here is the due process clause of the Fifth Amendment to the United States

[1] The suffix "a" hereinafter (*e.g.*, 1a) refers to page numbers within the appendices to this petition, *infra*.

Constitution. District Court jurisdiction is conferred by Sections 1331(a), 1337, 1361 and 1651 of the Judicial Code, 28 U.S.C. §§ 1331(a), 1337, 1361 and 1651, and Sections 10(c) and (e) of the Administrative Procedure Act, 5 U.S.C. §§ 704 and 706. Other relevant provisions are Federal Trade Commission Act § 5, 15 U.S.C. § 45, Rule 19 of the Federal Rules of Civil Procedure and Section 3.22 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22. These provisions are printed in Appendix F hereto.

## Statement of the Case

The petitioner, PepsiCo, brought the present action in the District Court for the Southern District of New York to prevent the Federal Trade Commission and its members[2] from taking any further action in its proceeding titled "In The Matter of PepsiCo, Inc., a corporation, Docket No. 8856" in which the Commission is seeking to nullify fundamental provisions of exclusive bottling appointment agreements between PepsiCo and bottlers of soft drinks sold under PepsiCo's trademarks without joining the bottlers as parties in the proceeding. The District Court denied PepsiCo's motion for a preliminary injunction and dismissed the complaint, and a divided panel of the Court of Appeals affirmed.

PepsiCo is the owner of the registered trademarks PEPSI-COLA and PEPSI, as well as numerous other trademarks under which soft drinks are sold. Soft drink concentrates and syrups manufactured by PepsiCo are sold to the bottlers who have entered into exclusive bottling ap-

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[2] After judgment was entered in the Court of Appeals, Miles W. Kirkpatrick resigned as Chairman of the Commission. His successor, Lewis A. Engman, has been substituted as a respondent in this Court. Supreme Court Rule 48(3).

pointment agreements with PepsiCo. On the strength of the right of exclusive representation in defined territories and trademark licenses granted them in their agreements with PepsiCo, hundreds of independent bottlers have built successful local businesses and over the years have expended huge sums for investments in plant, manufacturing and distributing equipment and facilities, and in creating and maintaining a market for PepsiCo's beverages in competition with a wide variety of other soft drinks.

Notwithstanding that the validity of such agreements has been repeatedly and consistently upheld by the courts,[3] in July, 1971 the Commission issued a complaint charging that PepsiCo's exclusive bottling and trademark license agreements with the bottlers "constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act." Though the proposed form of order accompanying this complaint would forbid PepsiCo from continuing, enforcing or renewing the exclusive territorial provisions of its trademark license agreements now in effect between PepsiCo *and the bottlers,* the administrative complaint named only PepsiCo as a respondent and the bottlers, whose vital interests—and in some areas, continued existence—have been placed in jeopardy, were not joined as parties.

After several bottlers and the Pepsi-Cola Bottlers Association successfully intervened in the administrative proceeding,[4] PepsiCo moved the Administrative Law Judge

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[3] *See, e.g., Brosious* v. *Pepsi-Cola Co.,* 155 F.2d 99 (3d Cir. 1946); *Jones* v. *Pepsi-Cola Co.,* 223 F. Supp. 650 (D.Neb. 1963).

[4] Although the Court of Appeals found that the bottlers and trade association intervening in the administrative proceeding had "all those rights 'provided by law' that are essential to a fair hearing" (7a-8a), the dissent showed that the intervenors had not been given "the right of full participation" that is accorded full

either to dismiss the FTC proceeding or to join the bottlers as parties respondent. These motions were denied notwithstanding the Administrative Law Judge's recognition that an adverse Commission decision would leave the bottlers without recourse to enforce their contract rights and "may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts."[5] (53a). In substance, the Administrative Law Judge decided plaintiff's motion "[a]s a practical matter," concluding that "it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding." (54a). Nowhere, however, did either the Administrative Law Judge or the Commission in its subsequent order show why the bottlers could not be joined or demonstrate any difficulties in effecting joinder which could possibly warrant denial of the bottlers' and PepsiCo's rights to due process of law. Indeed, in dissenting below, Judge Medina concluded there was "no merit" to the argument that joining the bottlers would make the administrative proceeding unmanageable. (30a).

When PepsiCo thereafter requested the Commission for permission to file an interlocutory appeal, the Commission treated the question of joinder of the bottlers as if it had been certified by the Administrative Law Judge, and held that the bottlers were not indispensable parties within the meaning of Rule 19 of the Federal Rules of Civil Procedure and that the FTC proceeding should continue in

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parties. (24a). Significantly, after the Court of Appeals decision herein, the Commission itself denied an intervenor before the Administrative Law Judge the right of complete participation in the appeal of the Administrative Law Judge's decision to the full Commission. *Adolph Coors Co.*, —— FTC ——, 3 CCH TRADE REG. REP. ¶20,178 (Dkt. 8845, Dec. 21, 1972).

[5] The Administrative Law Judge's order is reproduced in Appendix D hereto.

their absence.[6] It reasoned that if an "interest is not a legally protected one, as for example rights pursuant to a contract declared illegal under the antitrust laws, it cannot serve as a basis for a joinder of allegedly indispensable parties. The fact that a contract may have previously not been illegal does not alter the result." (48a-49a). In short, the Commission, in refusing to join the bottlers and grant them the right to be heard as parties, assumed the conclusion in advance of trial that PepsiCo's agreements with its bottlers are unlawful.

With the issuance of the Commission's order and all avenues for administrative review having thus been exhausted, this suit for declaratory and injunctive relief was commenced by PepsiCo in the District Court for the Southern District of New York. The District Court denied PepsiCo's motion for a preliminary injunction or, in the alternative, summary judgment, and dismissed the complaint on the ground that the District Court lacked jurisdiction to review an interlocutory Federal Trade Commission order. (33a). PepsiCo and Pepsi-Cola Bottling Company of Corvallis, Inc. (Pepsi-Corvallis), which is not a party to the FTC proceeding and which had intervened in this action before the District Court, appealed to the United States Court of Appeals for the Second Circuit.

Suddenly, on or about July 31, 1972—almost three weeks after the notices of appeal were filed, and to PepsiCo's complete surprise—complaint counsel in the FTC proceeding moved for partial summary decision, asking the Administrative Law Judge to declare illegal *per se,* upon the pleadings and without any factual hearing, the terri-

[6] The Commission's order is reproduced in Appendix C hereto.

torial provisions of the trademark license agreements which have been used by PepsiCo and the bottlers for decades.[7]

In addition, complaint counsel's motion for partial summary decision in the FTC proceeding proposed a new and extraordinary remedy, referred to as a "Metro Area Bottler Handicap" provision, which had never before been mentioned either in the complaint or in pre-trial proceedings. Under this proposal, as interpreted by complaint counsel, "the larger bottlers now doing business in the 200 largest metro areas . . . for 10 years are limited to selling in metro areas and forbidden to sell in any non-metro areas which such large bottlers do not presently serve." Exhibit B to PepsiCo Motion in Court of Appeals for Injunction Pending Appeal. Smaller bottlers would not be similarly restricted and could sell into any other bottler's territory. This proposed relief purports to "limit" and "forbid" certain bottlers from selling in various areas and thus would create for some ten years at least two classes of bottlers although none of the affected bottlers have been joined.[8] (25a). As pointed out by the dissent below, the Commission proposes "that by agency action new contracts be created and imposed upon an entire industry, although the interested parties are not represented in the adjudicatory process." (25a).

Chief Judge Friendly, speaking for Judge Anderson and himself, affirmed the District Court's order dismissing the

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[7] On April 5, 1973, the Administrative Law Judge handed down a decision denying complaint counsel's motion for partial summary decision in the FTC's similar case against The Coca-Cola Company. No decision has been received in the PepsiCo case as of the time of printing this petition.

[8] A motion for an injunction pending appeal, made after the disclosure of the proposed "Metro Area Bottler Handicap" provision, was denied by the District Court and the Court of Appeals; however, the Court of Appeals granted an expedited appeal.

complaint. (20a). Judge Friendly assumed for purposes of the decision that the District Court had jurisdiction "if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order" (12a), and proceeded to hold that the bottlers would be bound by the result but need not be joined. The Court majority indicated that voluntary intervention provided an adequate safeguard for the bottlers and the possibility that the Commission may expressly obligate the absent bottlers under the proposed "Metro Area Bottler Handicap" does not alter the result.

Judge Medina dissented and said he "would remand the case to the District Court with instructions to enjoin the FTC from further proceeding in its effort to restructure the soft drink industry until it had made the PepsiCo bottlers parties." (30a). He characterized the majority opinion as "another example of corner-cutting" (28a), and replied to the argument that joining so many bottlers would make the proceeding unmanageable by stating that "[b]ack in the days of the Medes and Persians this argument might have seemed plausible. But in a modern setting it has no merit whatever. . . ." (30a). Judge Medina was "unable to understand why the FTC has taken such an adamant position against making the bottlers parties . . . unless it anticipates greater scope and control of the whole proceeding to restructure the soft drink industry if confusion reigns supreme." (27a). He was "convinced that PepsiCo is doing everything it can to expedite the proper conduct of the FTC proceeding." (26a).

There is no way other than by application to this Court that PepsiCo can raise the issue of nonjoinder before it is too late to prevent a decision on the merits in a totally defective proceeding.

## REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the joinder of otherwise absent industry members who are parties to the agreements attacked as unlawful, and who will be bound by the Federal Trade Commission's threatened imposition of unequal rights and restraints and the destruction of substantial property and contract rights in its attempt to restructure an entire industry. Although this Court has not directly passed upon a federal administrative agency's refusal to join industry members who are parties to the contracts at issue and who will effectively be directly subjected to any possible cease-and-desist order the Commission may issue, the lower court's decision runs counter to many holdings of this Court. This issue affects not only the several hundred PepsiCo bottlers who are neither parties nor intervenors in the underlying administrative proceeding and the franchisees of other soft drink companies in similar litigations,[9] but also thousands of people, particularly those with franchised businesses, whose industries may be the focus of future FTC proceedings.

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[9] Similar proceedings have been brought by the FTC against The Coca-Cola Company (and related corporations), Crush International Limited (and related corporations), Dr Pepper Company, The Seven-Up Company, National Industries, Inc. (and related corporations), Royal Crown Cola Company, and Norton Simon, Inc. (and related corporations). Similar District Court actions for judicial review were brought by The Coca-Cola Co. in the Northern District of Georgia, and by The Seven-Up Company in the Eastern District of Missouri. Both complaints have been dismissed (*Coca-Cola Co.* v. *FTC*, 342 F. Supp. 670; *Seven-Up Co.* v. *Goodhope*, 349 F. Supp. 551); the former dismissal has been affirmed by the United States Court of Appeals for the Fifth Circuit, —— F.2d ——, 1973 Trade Cas. ¶ 74,360, and the latter is on appeal in the Eighth Circuit.

The Federal Trade Commission is seeking in the administrative proceeding *inter alia* to terminate the exclusive appointment provisions in all of PepsiCo's soft drink trademark license agreements and to place different restrictions on existing bottlers during a period of adjustment if the Commission invalidates the territorial provisions of their franchise agreements. The Court of Appeals has made clear that the absent bottlers will be bound. Aside from the controlling effect of an adjudication of illegality, using the words of the Court of Appeals, "in an agency proceeding seeking to vindicate public rights against a respondent, the private rights of other parties can be concluded if they have had notice and an opportunity to intervene." (15a).

The District Court not only has jurisdiction but also the responsibility to rule on joinder of indispensable parties prior to administrative decision of the antitrust issues to avoid an obviously fatal error made at the outset which would terminate "this litigation without having the parties invest untold efforts and vast expense in a . . . wholly irrelevant contest. . . ." *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, —— U.S. ——, 41 U.S.L.W. 4131, 4140 (Jan. 10, 1973) (Burger, J., dissenting). The full Commission has ruled on the question of joinder of the bottlers and its decision will undoubtedly be binding within the Commission as the case proceeds.

The narrow legal issue raised here does not call for the development of facts or the exercise of administrative expertise. Indeed, a flexible approach to insure judicial and administrative economy requires that such a fundamental question be resolved early in order to prevent lengthy but useless administrative proceedings. *E.g.*, *McGee* v. *United States*, 402 U.S. 479, 485 (1971); *McKart* v. *United States*, 395 U.S. 185, 197-199 (1969); *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698, 710-

711 (D.C. Cir. 1971). Not only should a District Court consider an agency's unconstitutional procedural action, *e.g.*, *Fay* v. *Douds*, 172 F.2d 720 (2d Cir. 1949), but naked legal issues involving interlocutory agency orders should be decided on the merits, *Wolf Corp.* v. *SEC*, 317 F.2d 139, 141 (D.C. Cir. 1963) (Burger, J.), to avoid unnecessary delay. Immediate review is a safeguard against injury from lengthy, void proceedings. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 154 (1967). The "basic purpose of the exhaustion doctrine . . . to allow an administrative agency to perform functions within its special competence," *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972), is lacking here since the procedural issue is one of constitutional dimension which was decided through analogy to the Federal Rules of Civil Procedure by both the Administrative Law Judge (52a-53a) and the full Commission. (48a). "[T]he situation is no longer what it was when [*Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)] was decided . . . [since] there is no longer the same violent disposition to fight the agencies willy-nilly." *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970), *quoting* L. Jaffe, Judicial Control of Administrative Action 435 (1965). All members of the Court of Appeals panel agreed that immediate review is available when an administrative proceeding "is being conducted in a manner that cannot result in a valid order" (12a), and "[w]hile PepsiCo and its bottlers cannot be heard to complain of the Commission's attempt to accomplish this restructuring, arguably they should not be placed under that threat in a proceeding that must prove to be a nullity." (13a).

It is fundamental doctrine, announced by this Court more than a century ago in *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1854), that all persons materially interested in the subject matter of a proceeding must be made parties

to the proceeding so that there may be an equitable and complete resolution of the dispute. This Court there laid down the definition of an indispensable party that is still followed today:

> "... Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." 58 U.S. (17 How.) at 139.

This Court has followed the rule of *Shields* v. *Barrow* through the years (*e.g., Western Union Telegraph Co.* v. *Pennsylvania,* 368 U.S. 71 (1961); *Gregory* v. *Stetson,* 133 U.S. 579 (1890)), and it has been applied in Federal Trade Commission proceedings such as the one here. *E.g., Sinclair Refining Co.* v. *FTC,* 276 F. 686 (7th Cir. 1921), *aff'd,* 261 U.S. 463 (1923). Rule 19 of the Federal Rules of Civil Procedure, adopted in 1966, was not designed to alter the principles set forth in the leading cases of the Court; these principles "are still valid today." *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 124 (1968). Used by both the Administrative Law Judge and the full Commission as "a practical framework within which to arrive at a decision" (52a), Rule 19 specifies that a person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction shall be joined if

> "(1) in his absence complete relief cannot be accorded among those already parties, *or* (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) *as a practical matter* impair or impede

his ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." (Emphasis added).

Can the proposed "Metro Area Bottler Handicap" provision provide complete relief in the bottlers' absence? If so, it demonstrates "as a practical matter" how the failure to so advise the bottlers and to notify them that they are full parties in the administrative proceeding impairs (if not eliminates) their ability to protect their interests. PepsiCo has attempted to join the absent bottlers as full parties to avoid a multiplicity of suits, brought by them as strangers to the FTC proceeding, if PepsiCo's present franchise system is found to be illegal. In such event, unless the bottlers are made parties to the FTC proceeding, PepsiCo will inevitably be defending against the substantial risk of incurring multiple or inconsistent obligations as bottlers who have built up their entire businesses on the premise that each would be the exclusive PepsiCo representative in a particular area take action to protect and enforce their valuable contract and property rights. Instead of leaving it for adjudication in each such suit that PepsiCo has an impossibility of performance defense if the Commission invalidates its agreements with the bottlers, why should not the basis for a multiplicity of suits be removed at the outset by joining the bottlers as parties in the FTC proceeding? The issue of indispensability can be raised by any already joined party that may be adversely affected by any order, 3A J. Moore, FEDERAL PRACTICE, ¶ 19.01-1[2] at p. 2119 (1970), and the doctrine is applicable even when the absent parties cannot be technically bound. 7 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1602 at pp. 20-21 (1972).

The Court of Appeals not only agreed that it is desirable to have the absent bottlers bound by the final administrative result, but found that the bottlers would be bound in their absence because of the overriding effect accorded to enforcement of a federal regulatory statute. (17a). Because the bottlers will be bound and the Commission plainly has the power to bring the bottlers into the administrative proceeding as parties respondent, it necessarily follows that fairness to all requires that this power be exercised. *See Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71, 80 (1961). An administrative agency is not exempted from the settled rules with respect to joinder of indispensable parties merely because it seeks to vindicate public rights. If this view were to prevail, the indispensable party doctrine would never be applicable in any case brought by the Government. There have in fact been numerous antitrust cases in which enforcement agencies have joined all contracting parties (*e.g., United States* v. *Arnold Bakers, Inc.*, 1970 Trade Cas. ¶ 73,188 (E.D. Pa. 1970)) and the principles underlying the indispensable party doctrine have been consistently honored in antitrust proceedings. *E.g., United States* v. *Northern Pacific Railroad Co.*, 134 F. 715 (8th Cir. 1905); *United States* v. *United Shoe Machinery Co.*, 222 F. 349 (D. Mass. 1915), *aff'd*, 247 U.S. 32 (1918); *Fruit Growers' Express, Inc.* v. *FTC*, 274 F. 205 (7th Cir.), *cert. granted*, 257 U.S. 627 (1921), *cert. dismissed*, 261 U.S. 629 (1923); *Sinclair Refining Co.* v. *FTC*, 276 F. 686 (7th Cir. 1921), *aff'd*, 261 U.S. 463 (1923). *See also United States* v. *Standard Oil Co. of New Jersey*, 152 F. 290 (E.D. Mo. 1907). Only where the contractual provisions "were inserted for the benefit" of the party present at the litigation "and were of such restrictive character that no right" of the absent parties "could be injuriously affected" have the antitrust courts

held that absent parties to the contract need not be joined. *E.g., United Shoe Machinery Co.* v. *United States,* 258 U.S. 451, 456 (1922); *Automatic Canteen Co.* v. *FTC,* 194 F.2d 433, 437 (7th Cir. 1952), *rev'd on other grounds,* 346 U.S. 61 (1953).

What we have here is not the liberation of absent parties from obligations imposed on them by a party to the proceeding. Instead, the FTC seeks to abrogate the absent bottlers' valuable rights under exclusive trademark license agreements—rights which have never been challenged and which have been uniformly sustained by the courts—and to impose unequal rights and restraints upon them. The Commission's reliance upon this Court's decision in *National Licorice Co.* v. *NLRB,* 309 U.S. 350 (1940), is thus misplaced. In *National Licorice* the employment contracts in issue granted employees minimal benefits and imposed substantial restraints. This Court stripped the employer of the advantages of his coerced contracts, but expressly left in force provisions according employee benefits, modifying the NLRB's order so that it was "without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts." 309 U.S. at 367. Implicit in this modification of the Board's order, and in the interpretation of the majority opinion by Justices Douglas and Black in their concurring opinion,[10] was the notion that "the employees would be indispensable parties

[10] Justices Douglas and Black saw "no reason or occasion for the modification of the order" since the Board has "not undertaken to pass on the rights of the employees under those contracts." Nor "has any employee urged, here or below," they emphasized, "that the order affects his contractual rights or casts a cloud on them. *Whether the employees would be indispensable parties to the proceeding should the Board . . . undertake to nullify their rights* is a question on which we want to reserve decision until the Board passes on it and until it is put in issue by persons who have a standing to raise it." 309 U.S. at 369-370. (Emphasis added).

to the proceeding should the Board . . . undertake to nullify their rights. . . ." 309 U.S. at 370. The Commission's attempt in the FTC proceeding to nullify the contract and property rights of the bottlers without joining them as parties flouts this implication of *National Licorice*. It is likewise inconsistent with this Court's earlier decision in *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938), where it was held that a union and its locals "having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside." 305 U.S. at 233.

To hold, as the Court of Appeals has here, that bottlers who will be bound in their absence are not indispensable parties because they could intervene, is to stand constitutional doctrine on its head by shifting the burden from plaintiff to third party strangers to the action to take the initiative to protect affected rights. There is no option under Rule 19(a) (used by the Commission and the courts below as the relevant analogy) to substitute intervention in place of compulsory joinder. Notwithstanding that the bottlers are undoubtedly aware of the FTC proceeding, this Court has consistently held that intervention is no substitute for joinder. If this were the rule, no suit could be dismissed for failure to join indispensable parties because intervention would always be available. *Cf.* FED.R.CIV.P. 24(a)(2).[11]

*A fortiori* a right to intervene cannot replace compulsory joinder where, as here, the proposed relief effectively would impose prohibitions upon some bottlers for ten years, thus creating both a restricted and a non-restricted class. It is

[11] Even if the bottlers were not bound, they would be indispensable parties because of the substantial risk that in the interminable litigation that would follow a Commission order, inconsistent obligations would arise.

elementary that those who will be bound by a Commission or court order must be a party to the underlying litigation and antitrust suits asserting "public rights" are no exception.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

MILTON HANDLER
*Attorney for Petitioner*
*PepsiCo, Inc.*

*Of Counsel:*

FRED A. FREUND
ELIZABETH HEAD
KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER

JAMES G. FRANGOS
MUDGE, ROSE, GUTHRIE, ALEXANDER
& MITCHELL